

APR 26 1983

ALEXANDER L. STEVAS,
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1982

O

DONALD E. MAYNARD,

APPELLANT,

vs.

SPROUL A. McGUINNESS and all
other similarly situated,
ROBERT EARL MERRITT and
CLELLA MERRITT, and the
MERRITT RANCH COMPANY,

APPELLEE.

ON APPEAL FROM THE SUPREME
COURT OF MONTANA

JURISDICTIONAL STATEMENT

DONALD E. MAYNARD, pro se
P. O. Box 4063
Helena, Montana 59604
Telephone 406/443-6014

QUESTIONS PRESENTED

1. Whether it shall be permitted that appellant's property in question; mineral survey No. 1198 shall be taken from him without a chance for a jury trial as guaranteed by the Seventh Amendment, U.S. Constitution, "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."
2. Whether due process of law was followed as guaranteed by the Fourteenth Amendment, U.S. Constitution Section 1, "...nor shall any State deprive any person of ... property without due process of Law..." When appellant's deed to M.S. No. 1198 was declared void because of the purported omission of the filing of an affidavit as required by Montana Statute 15-18-202 and 15-18-204 M.C.A.

3. Whether 15-18-205 does or does not supercede the above 15-18-202, 15-18-204, 15-18-205 M.C.A. and 28 U.S.C. 2403(b) may also be applicable.

In Storin v. New York, 115 U.S. 257 Chief Justice Waite said, "...the character of a case is determined by the questions involved,..." if from the quotation it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, within the meaning of that term as used in the act of 1875, otherwise not.

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JURISDICTIONAL STATEMENT

OPINION BELOW

Judgment of Montana Supreme Court affirm-
ing Lower Court's Judgement, entered February

19, 1983 and printed in State Reporter 40
St. Rep. 230 (Appendix D).

JURISDICTION

The Statutory provision believed to confer on this Court jurisdiction to review the Judgment below in question is 28 U.S.C. 1257 (1) and (2).

The final judgment was made on February 18, 1983 and Notice of Appeal was filed March 7, 1983 done in timely fashion.

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

U. S. Constitution, Seventh Amendment:

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...."

U.S. Constitution, Fourteenth Amendment, Section 1:

"...nor shall any State deprive any person of ... property without due process of law...."

STATEMENT OF THE CASE

The case involves an 83.4, A. patented mining claim which along with another 346A's are part of the Merritt Ranch Company. The Hale Estate was the owner in 1953, when the surface rights were sold with reservations to a B. F. Otten, the predecessor in interest to the Merritt Ranch Company. The total surface rights purchased totaled about 429.46 A. After the sale of surface rights, the mineral rights were separately taxed, a notice of such taxes going to a Robert H. McGinness. He paid them for a time, but shortly thereafter tried to give them to his step-son, Willard P. Birkholz, who refused, saying that, "I had no interest in

the mineral survey No. 1198 and told my stepfather that fact" (Appendix J appellants jurisdictional statement).

In the year 1959, taxes not having been paid on the property as provided for by law was offered for sale at public auction. No person offering to buy any part thereof, the property was struck off to the County of Lewis and Clark, Montana and a tax deed issued from the County Treasurer to the County of Lewis and Clark for the whole 429.46 A. in the year 1968, nine years after the last taxes were paid.

The Merritts were notified of the notices in the paper for tax sales of all the mineral rights by a neighbor, Mrs. Viola Nelson (Appendix F).

In the year 1969, January 3, Donald E. Maynard, the appellant above, bought the 83.4 A. and was issued a bargain and sale deed from the county. The remaining 346 A. of mineral rights were later in the

year 1969, purchased by an Earl Lutzenhis-
er of Helena, Montana and he received a
Bargain and Sale Deed from the county in
the same manner and form as Maynard. He
still enjoys ownership of his mineral
rights not having been brought into this
suit as required to do substantial justice
to all parties. Donald E. Maynard paid
all taxes assessed from 1969 onward to
this date as they were levied, and from
time to time prospected on the property
and fished seasonally every year on it and
finally when the price of gold leaped
upward, began to mine it, having erected a
tool shed on the property and later a
mobile home and finally a 16 x 42 foot
house. About this time, the Merritts
brought suit against him after having
found a 1/216 interest distributee of the
Hale estate to agree to lend his name to
the proceedings, the Sproule A. McGinness,
that was misspelled into Sproul A. Mc-

Guiness on the caption of the title, and done so at the beginning of the action.

Final judgment in the case was rendered by the Supreme Court February 18, 1983 affirming the judgment of the District Court. Maynard at all times, requested a jury trial even at the inception of the action, and a federal issue was made of it very affirmatively in his reply brief to the Supreme Court of Montana (appendix J, page 75) raising the federal questions of both the Seventh and Fourteenth Amendments being involved. The Supreme Court ruled he was not entitled to a jury trial (Appendix D, page 43).

From thence on, the Merritts have obtained an order from the District Court that appellant Maynard, being unfamiliar with court procedures was unable to oppose and have forced Maynard to remove all his property and structures from his mining claim.

SUBSTANTIALITY OF FEDERAL QUESTIONS

The questions raised in this case are perhaps among the most vital that a citizen can become apprehensive about, for they go to the heart of his belief in the due process of law; we all have been led to believe that property cannot be taken from us without due process of law and that means with a jury of our peers to ascertain the facts. It means otherwise, that no one can be sure that the property he has come to call his own and has paid taxes on (for thirteen years in this case) can arbitrarily be taken from him by calling his deed void. This is repugnant to the due process clause of the Fourteenth Amendment and our universally accepted ideas of fair play.

In Patton v. United States, 281 U.S. 276, 312, "The right to trial by jury is of ancient origin, characterized by Blackstone as "The Glory of the English Law"

and "the most transcendent privilege which any subject can enjoy" (Bk. 3, pg. 379) and as Justice Story said (2 Story on the Constitution § 1779) "The Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms."

In the same vein, we find in Dimick v. Schiedt U.S. 474, 486, "maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Also in Beacon Theatres v. Westover 359 U.S. 511, the opinion of the Supreme Court clearly stated the right to require a jury trial by granting mandamus, "...we think the right to grant mandamus to require jury trial where it has been

improperly denied is settled."

Again with Blackstone (Bk. III, p. 381), I say "...It is, therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power, this valuable constitution in all its rights; to restore it (jury trial) to its ancient dignity, if at all impaired by the different value of property, or otherwise devoted from its first institution; to amend it; wherever it is defective; and above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial,..."

CONCLUSION

To bring the two justice systems into a more harmonious relationship, conform to the Constitution, and for the above reasons, appellant believes the questions are so substantial as to require plenary consideration with briefs on the merits

and oral argument for their resolution
and/or the decision above reversed.

Dated 26 day of april 1983.

Respectfully submitted,

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1-406-443-6014

APPENDIX A

11

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE
OF MONTANA, IN AND FOR THE COUNTY OF
LEWIS AND CLARK

No. 46316

FINDINGS OF FACT,

CONCLUSIONS OF LAW

AND PARTIAL SUMMARY JUDGMENT

SPROUL A. McGUINNESS and all other
similarly situated, ROBERT EARL
MERRITT and CLELLA MERRITT, and
MERRITT RANCH COMPANY,

Plaintiffs,

vs.

DONALD E. MAYNARD and LEWIS AND
CLARK COUNTY, MONTANA, a political
subdivision of the State of Montana,

Defendants.

This matter came on for hearing
on Plaintiffs' Motion for Summary

Judgment on the 27th day of January, 1982, the Plaintiffs being represented by John P. Poston of the firm of Harrison, Loendorf and Poston, Defendant Donald E. Maynard being represented by Richard J. Pyfer of the law firm of Small, Hatch and Doubek; and Defendant Lewis and Clark County being represented by Deputy County Attorney Thomas C. Honzel. The Plaintiffs' motion was based upon the court file and the depositions contained therein. The matter was briefed by the Plaintiffs and Defendant Donald A. Maynard, who also submitted certain affidavits.

The Court being fully apprised as to the law and the facts hereby makes the following Findings of Fact:

FINDINGS OF FACT

1. The Defendant Donald E. Maynard's claim of title to the real property

in question, namely Placer Survey No. 1198, is derived from that certain tax deed issued by Lewis and Clark County on the 3rd day of January 1969.

2. That the interest claimed by Defendant Maynard is the ownership of the mineral estate.

3. The Defendants acknowledge and admit that the surface estate is owned by Earl Merritt, Clella Merritt and the Merritt Ranch Company.

4. The parties have heretofore stipulated that Sproul A. McGuiness has standing to bring this suit by reason of his being named heir in the Estate of Robert S. Hale.

5. It is admitted and acknowledged by the Defendant Lewis and Clark County, and by Defendant Donald A. Maynard, that Lewis and Clark County

Clerk and Recorder failed to make and file an affidavit as required by Section 15-18-204, MCA.

6. That the failure of the Lewis and Clark County Clerk and Recorder to make and file such an affidavit is a fatal defect in the procedure to be followed by county officials in issuing a tax deed.

From the foregoing findings the Court now makes the following conclusions:

CONCLUSIONS OF LAW

1. That the law as enunciated by the Supreme Court of Montana in the case of King v. Rosebud County, 38 St. Rep. 1145, is controlling in this case and, therefore, the failure of the Lewis and Clark County Clerk and Recorder to make and file an affidavit as required by Section

15-18-204, MCA, precluded jurisdiction in the County Treasurer from issuing a tax deed.

2. That the tax deed issued on January 3, 1969, to Defendant Donald E. Maynard by Lewis and Clark County, is void.

3. That until such time as the County Clerk and Recorder complies with Section 15-18-204, MCA, proper notice has not been effected and the time for redemption has not commenced to run.

From the foregoing Conclusions, the Court makes the following order:

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Motion for Summary Judgment is partially granted and the tax deed issued by Lewis and Clark County on January

3, 1969, to Donald A. Maynard is deemed to be void ab initio.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants' asserted affirmative defenses relative to laches, statute of limitation and adverse possession are to be treated as a counterclaim and Plaintiffs' Motion for Summary Judgment relative to these counterclaims and/or affirmative defenses is hereby denied.

DATED THIS 2nd day of February, 1982.

Signed GORDON R. BENNETT, District
Judge

Filed February 3, 1982

Clara Gilreath, Clerk of District
Court

By Mary G. Harris, Deputy

APPENDIX B

17

IN THE DISTRICT COURT OF THE FIRST
JUDICIAL DISTRICT OF THE STATE OF
MONTANA, IN AND FOR THE COUNTY OF
LEWIS AND CLARK

No. 46316

FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

SPROUL A. McGUINESS and all others
similarly situated, ROBERT EARL
MERRITT and CLELLA MERRITT, and
MERRITT RANCH COMPANY,

Plaintiffs,

vs.

DONALD E. MAYNARD and LEWIS AND
CLARK COUNTY, MONTANA, a political
subdivision of the State of Montana,

Defendants.

The Affidavit and Motion of
Defendant Donald E. Maynard to disqualify
Judge Gordon R. Bennett for cause

came on for hearing this 15th day of June 1982, pursuant to notice of the court. Defendant Donald E. Maynard appeared pro se; Defendant Lewis and Clark County appeared by and through Deputy County Attorney, Tom Honzel; Plaintiffs appeared by and through their counsel of record, John P. Poston. Defendant Maynard produced both documentary and oral testimony in support of his motion and affidavit. The Court being fully advised as to the law and facts of the case, now enters the following Findings of Fact:

FINDINGS OF FACT

1. That Defendant's affidavit is totally insufficient in that it fails to state any facts or circumstances which would provide any proof of personal prejudice or bias on the part of Judge Gordon R. Bennett either

against the Defendant Maynard or in favor of the adverse parties.

2. That the oral and documentary evidence produced by Defendant Maynard fails to provide any credible evidence of personal prejudice or bias on the part of Judge Gordon R. Bennett either against the Defendant Maynard or in favor of the adverse parties.

From the foregoing findings, the Court draws the following conclusions:

CONCLUSIONS

1. That Judge Gordon R. Bennett does not have any personal prejudice or bias either against the Defendant Maynard nor in favor of the adverse parties.

2. That Judge Gordon R. Bennett should not be disqualified from presiding in this case.

From the foregoing Findings

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and Conclusions, the court enters its order as follows:

ORDER

1. That Defendant Maynard's Motion to disqualify Judge Gordon R. Bennett is hereby denied.

2. That Judge Gordon R. Bennett continue to preside in this case.

DATED this 16th day of June 1982.

Signed: ARNOLD OLSON, DISTRICT JUDGE

Filed June 18, 1982 11:35 am

Signed Mary G. Harris

APPENDIX C

21

IN THE DISTRICT COURT OF THE FIRST
JUDICIAL DISTRICT OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 46316

FINDINGS OF FACT,

CONCLUSIONS OF LAW AND JUDGMENT

SPROULE A. McGINNESS and all others
similarly situated, ROBERT EARL
MERRITT and CLELLA MERRITT, and
MERRITT RANCH COMPANY,

Plaintiffs,

vs.

DONALD E. MAYNARD and LEWIS AND
CLARK COUNTY, MONTANA, a political
subdivision of the State of Montana,

Defendants.

This matter came on for hearing
pursuant to notice, before the Court
sitting without a jury, on September
1, 1982. Plaintiff Sproule A. McGinness

did not appear in person, Plaintiffs Robert Earl Merritt, Clella Merritt, appeared individually and as agents for the Merritt Ranch Company. All Plaintiffs were represented by their attorney, John P. Poston, Defendant, Donald E. Maynard, appeared in person and represented himself pro se; Defendant Lewis and Clark County appeared by and through Thomas E. Honzel, Deputy County Attorney. This matter previously was before the Court on cross motions for summary judgment which resulted in an order and judgment granting Plaintiffs a partial summary judgment, heretofore entered on the 3rd day of February, 1982. The only issues to be resolved by the Court at this time were the claims represented by Defendant, Donald E. Maynard's counterclaim. Defendant presented

documentary and oral evidence in support of his claims, Plaintiffs submitted oral and documentary evidence in opposition to Defendant's claims.

The Court, being fully advised as to the law and facts of the case, now enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Defendant, Donald E. Maynard, purchased a tax deed from Lewis and Clark County, purporting to convey "mineral rights (with entry) to Placer Survey No. 1198" on January 3, 1969.

2. That the owner of said mineral rights as of January 2, 1969, was the Robert S. Hale Estate, No. 2461.

3. That on the 20th day of April 1953, the Estate of Robert S. Hale, deceased, conveyed the surface interest

of the property to the predecessors in interest of Plaintiffs Robert Earl Merritt, Clella Merritt and Merritt Ranch Company. The document conveying said surface rights is recorded in Book 174, page 553, official records of Lewis and Clark County, said document specifically requiring "the grantees shall pay all taxes on the above-described property for the year 1953 and thereafter, both on the surface and upon the minerals."

4. On the 19th day of February 1981, Plaintiffs brought this action for the purpose of quieting the title to the property subject to this suit, which is designated as Placer Survey No.1198 on the official records of Lewis and Clark County.

5. That on the 19th day of February 1981, Plaintiffs caused a lis pendens

to be duly filed with the Lewis and Clark County Clerk and Recorder's office in this action before the District Court.

6. That the Defendant, Donald E. Maynard, or his agents or representatives, did not conduct mining operations on the subject property prior to November 1977.

7. Defendant's occupation and possession of the property was not open, notorious, exclusive, adverse, continuous, or hostile for five years previous to the date that the complaint was filed in this action, and a lis pendens was filed with the Lewis and Clark County Clerk and Recorder's office.

8. That Plaintiffs, Robert Earl Merritt, Clella Merritt, and/or Merritt Ranch Company paid all taxes that

were assessed on the property for which a tax notice was sent to them for each year 1957 through 1982.

9. That the Defendant, Donald E. Maynard, has not paid all taxes assessed against the property during the term of his claimed adverse possession.

10. That the Plaintiffs, Robert Earl Merritt, Clella Merritt and/or Merritt Ranch Company, have used the property as a part of the land involved in their ranching operation each year since 1957 without interference or conflict with Defendant.

CONCLUSIONS OF LAW

1. Sections 70-19-401 and 70-19-402, MCA, require continuous possession of the property for a period of five years to create a right by adverse possession.

2. That the law of adverse possession of a mineral right has been set forth in the Montana Supreme Court decision in Lehfeldt v. Adams, 130 Mont. 395 P.2d 934 (1956), wherein the court stated that in order to prevail on a theory of adverse possession of a mineral interest a claimant "must show actual possession of the mineral interest by openly opening the mine" for the statutory period.

3. Defendant's occupancy and possession of the property was such in character and length of time that it failed to create a right by adverse possession.

4. That Defendant, Donald E. Maynard has no right, title or interest of any nature whatsoever by reason of adverse possession or otherwise, in that certain property known as

Placer Survey No. 1198 in Lewis and Clark County, Montana.

5. That the counterclaim of Defendant, Donald E. Maynard, claiming adverse possession of the property known as Placer Survey No. 1198 should be dismissed.

From the foregoing Findings of Fact and Conclusions of Law, the Court enters the following Judgment:

JUDGMENT

1. That the surface rights to the property known as Placer Survey No. 1198 belong to Robert Earl Merritt, Clella Merritt, and Merritt Ranch Company.

2. That the mineral interests in the property known as Placer Survey No. 1198 belong to Sproule A. McGinness and the other heirs of the Robert S. Hale Estate.

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3. That the counterclaim of Defendant, Donald E. Maynard, claiming adverse possession of the property known as Placer Survey No. 1198 is hereby dismissed and Defendant, Donald E. Maynard, is ordered to vacate the property within 30 days of receipt of these Findings, Conclusions and Judgment.

DATED this 14th day of September, 1982.

Signed GORDON R. BENNETT, DISTRICT
JUDGE

INDEXED JB 16, P164

APPENDIX D

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STATE REPORTER

Box 749

Helena, Montana

VOLUME 40

No. 82-397

SPROUL A. McGUINNESS et al.,

Plaintiffs and Respondents,

v.

Submitted: Jan. 6, 1983

Decided: Feb. 18, 1983

DONALD E. MAYNARD and LEWIS AND

CLARK COUNTY, MONTANA, a political

subdivision of the State of Montana,

Defendants and Appellants.

QUIET TITLE, Appeal from declaration of
tax deed to be Void ab initio, Whether it
was error to declare Appellant's tax deed
from Lewis and Clark County void, Whether
it was error to allow the owner of the
surface rights to a Placer Survey to
prosecute this Quiet Title action by
joining an heir of an Estate, Whether
Defendant's second attorney exceeded his
authority when he signed a stipulation
allowing an heir to bring this suit,
Whether Plaintiff's attorney followed the

proper procedures for a Quiet Title action, Whether Defendant's due process rights were violated when his initial attorney refused to request a jury trial, whether it was error to reward Plaintiffs since they had allegedly disregarded earlier opportunities to pay the taxes on the mineral interest-JUDGMENT, SUMMARY--MINES AND MINERALS.

Appealed from the First Judicial District Court, Lewis and Clark County, Hon. Gordon Bennett, Judge

For Appellants: Thomas C. Honzel, Helena
Donald E. Maynard, Pro Se

For Respondent: Harrison, Loendorf and Poston, Helena

John Poston, Helena

Submitted on briefs.

Opinion by Justice Morrison, Justices Sheehy, Shea and Weber concur.

Affirmed.

Justice Morrison, delivered the Opinion of the Court.

The District Court of the First Judicial District issued on February 2, 1982, a partial summary judgment declaring the January 3, 1969, tax deed issued to Donald E. Maynard, to be void ab initio. Then, on September 14, 1982, the same court issued a final judgment dismissing Maynard's alternative claim of adverse possession and returning the tax deed property to its previous owners. Maynard now appeals these judgments.

Prior to 1953, all surface and mineral rights, title and interests in Placer Survey No. 1198 were owned by the Robert S. Hale Estate. On April 20, 1953, Placer Survey No. 1198 was sold to B.F. Otten. The deed provided for the following reservation:

"...subject to the reservation in the grantor, the heirs and devisees of Robert

S. Hale, their successors and assigns of all mineral in said property with the rights of said parties, their lessees, successors and assigns to enter in and upon said property, with right of egress and ingress to explore for mining and mine and operate the same, extract therefrom and sell any ore and mineral, the right to erect buildings and equipment thereon and remove the same with the right of the use of surface therefor without any hindrance or restraint on the part of the grantees or their successors and free from any claim for damage resulting from such mining operations and all water rights pertaining to these mining claims are reserved by the grantor;

"...

"...The grantees shall pay all taxes on the above described property for the year 1953 and thereafter, both on the

surface, and upon the mineral..."(Emphasis supplied)

On December 11, 1956, the Merritts purchased Otten's surface rights interest in Placer Survey No. 1198. They have since paid all taxes assessed on that property in their names. However, in 1957, Lewis and Clark County commenced assessing the surface and mineral rights separately. Therefore, the Merritts paid only the taxes assessed against their surface rights.

The taxes assessed against the reserved mineral rights interest went unpaid. The county thereafter "struck off" the mineral interest and attempted to sell it. Defendant Maynard purchased that interest December 1968. Lewis and Clark County issued Maynard the tax deed on January 3, 1969.

Maynard's interest came to light in August 1979, when the Merritts attempted

to sell their interest in Placer Survey No. 1198. On February 19, 1981, Sproul A. McGuinness, an heir to the Robert Hale Estate, and the Merritts brought this suit to quiet title to the property. A lis pendens was filed in the office of the Lewis and Clark County Clerk and Recorder on that same day.

Pre-trial discovery by attorneys for all parties narrowed the scope of the issues. On August 19, 1981, plaintiffs, pursuant to Rule 34, Montana Rules of Civil Procedure, requested Lewis and Clark County to produce the affidavit required by section 15-18-204, MCA. The affidavit is the sole proof that notice of the sale of the property for delinquent taxes was given the owner of the property sold. Section 15-18-202 MCA. The county responded September 8, 1981, stating:

"...the affidavit of notice ...was not filed in the office of the Clerk and

Recorder and that, therefore, Defendant is unable to produce the same."

Plaintiffs moved for summary judgment on January 11, 1982. Following a January 27, 1982 hearing on that motion, the District Court held Maynard's tax deed to be void for failure to file the affidavit, pursuant to section 15-18-204, MCA. The court also denied, as premature, plaintiff's motion for summary judgment on Maynard's counterclaims of adverse possession, laches and the statute of limitations.

At defendant's request, his second attorney withdrew as counsel on April 10, 1982. Maynard has since proceeded pro se.

A hearing on Maynard's counterclaims specifically that of adverse possession, was held September 1, 1982, before the court sitting without a jury. Defendant's daughter testified that in 1975 she assisted her father in digging holes along

the creek with a posthole digger and panning that soil for gold. A small storage shed was constructed on the property in 1978 and a larger residence was constructed in 1980. A neighbor, Earl Lutzenhizer, testified to seeing Maynard pan for gold on the property for three years prior to September 1, 1982. Mr. Maynard himself testified that he had been "...testing for gold on that property since 1975." Excavating commenced in 1979 and buildings were constructed in 1978 and 1980. The mine allegedly became commercial and operating in 1979.

Clella Merritt testified for Plaintiffs that the Merritts first became aware of mining activities on their property on August 29, 1979. Then on March 23, 1980, Merritts learned that Donald Maynard had constructed a storage shed on their property. Jay Merritt testified that he saw no signs of mining activity on the

property prior to 1976. He was out of state from 1978 to 1980 and first noticed mining excavations in 1980 or 1981. Finally, Gil Alexander, an ex-resident of the area with training in geological research and mining exploration, testified that although he had been on the property for recreational purposes many times previous to 1977, he had never noticed any evidence of mining activity.

The District Court concluded in its judgment dated September 14, 1982 that: "Defendant's occupancy and possession of the property was such in character and length of time that it failed to create a right by adverse possession." Further, the surface rights of Placer Survey No. 1198 were held to belong to Robert Earl Merritt, Clella Merritt and the Merritt Ranch Company; the mineral interests of Placer Survey No. 1198 were held to belong to Sproul A. McGuinness and the other

heirs of the Robert Hale Estate; Donald Maynard's claim of adverse possession was dismissed.

In his appeal of that judgment, Donald Maynard presents these issues:

1. Did the District Court err in declaring Defendant/Appellant Donald E. Maynard's tax deed from Lewis and Clark County void?
2. Did the District Court err in allowing the owner of the surface rights of Placer Survey No. 1198, Merritt Ranch, to prosecute this quiet title action by joining Sproul A. McGuinness, an heir of the Robert Hale Estate.
3. Did defendant's second attorney exceed his authority when he signed the stipulation allowing Sproul A. McGuinness to bring this suit?
4. Did plaintiff's attorney follow the proper procedures for a quiet title action as required by sections 15-18-401 and

15-18-402, MCA?

5. Were defendant's due process rights violated when his initial attorney refused to request a jury trial?

6. Did the District Court err in rewarding Merritts since they had allegedly disregarded earlier opportunities to pay the taxes on the mineral interest?

We find no abuse of discretion and affirm the decision of the District Court.

Section 15-18-204 MCA, states in part:

"Affidavit of notice. No deed of the property sold at a delinquent tax sale shall be issued by the county treasurer to the purchaser of the property until the proof of service of notice of application for tax deed has been filed with the county clerk and recorder as required by 15-18-202."

The provisions of section 15-18-204, MCA are mandatory and prohibitory. They

specifically prohibit the issuance of a tax deed by the county treasurer until after such an affidavit has been filed. *King v. Rosebud County* (1981), ___ Mont. ___, 631 P.2d 711, 38 St. Rep. 1145. No affidavit was filed in this case. Therefore, the tax deed issued to Maynard by the Lewis and Clark County Treasurer is void ab initio.

Further, there was no open, notorious, exclusive, adverse, continuous or hostile occupation or possession of the property by Maynard for five years prior to the date the complaint was filed, - February 19, 1981. Section 70-19-401, MCA; *Scott v. Weinheimer* (1962), 140 Mont. 554, 374 P.2d 91. Neither has Maynard shown "actual possession of the mineral interest by openly operating the mine" for the same five year period. *Lehfeldt v. Adams* (1956), 130 Mont. 395, 400, 303 P.2d 934, 937. Therefore, Maynard has not acquired

title to the mineral interest of Placer Survey No. 1198 through adverse possession.

Maynard's remaining contentions are meritless. Attorneys for all parties stipulated that Sproul A. McGuinness was an heir of the Robert Hale Estate and thus vested with sufficient title and standing to bring the quiet title action. Richard Pyfer signed the February 3, 1982 stipulation was attorney for Maynard. Maynard had signed a Notice of Change of Attorney October 27, 1981, designating Pyfer's firm as his new counsel of record. Therefore, Pyfer was acting within the scope of his authority when he signed the stipulation.

The procedures for a quiet title action found in section 15-18-401 and 15-18-402, MCA, are procedures to be followed when a purchaser of a property tax deed wishes to quiet his title to that property as against anyone else. They are

procedures Maynard would have followed had he sought to quiet his title to the mineral interests. They do not apply to quiet title actions by the true owner of the property.

Actions to quiet title are actions in equity. R. McClintock, Handbook of the Principles of Equity, section 192, p. 520 (2d ed. 1948). Judges may empanel juries for equity actions; however, they are not bound to do so. *Downs v. Smyk* (1982), ___ Mont. ___, 651 P.2d 1238, 39 St. Rep. 1786. Defendant was not entitled to a jury trial. His due process rights were not violated when his attorney failed to request a jury trial.

Finally, Merritts were not "rewarded". They received only that to which they were legally entitled, the surface rights to Placer Survey No. 1198.

The judgment of the District Court is affirmed.

APPENDIX E

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AFFIDAVIT

STATE OF MONTANA)
County of Lewis and Clark) : ss

I, WILLARD P. BIRKHOLZ, being duly
sworn depose and say:

That I reside at 1616 2nd Avenue No.,
Great Falls, Montana; that I am the
stepson of Robert H. McGuinness and the
son of his widow Dorothy M. McGuinness of
Great Falls, Montana; that my stepfather
has been deceased for approximately fif-
teen (15) years; that before he died my
stepfather had received tax notices from
Lewis and Clark County, Montana, for the
mineral rights on Survey #1198 at or near
Austin, Montana; that my stepfather talked
with me on a number of occasions about his
ownership of the mineral rights to Survey
#1198 and told me that he had received the
tax notices for a number of years which I
know was more than five (5) years; that
during the year prior to his death my

stepfather told me that he did not have much money and had stopped paying the taxes on Survey #1198 and he said that he wanted to let the mineral interest go for taxes unless I wanted to pick up the taxes; that I had no interest in the mineral survey #1198 and told my step-father that fact; that it was made clear to me by my stepfather that he had owned this mineral interest for many years and owed back taxes on it which he was not able to pay and did not want to pay; that he decided to let this mineral interest go for taxes prior to his death; that he offered the interest in this survey to me and I had no use for them and let the interest go for taxes also.

Signed WILLARD P. BIRKHOLZ

SUBSCRIBED AND SWORN to before me
this 26th day of January 1982.

Signed Thomas Howard

Notary Public for the State of

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Montana, Residing at Great Falls, Montana,
My Commission expires June 21, 1983.

APPENDIX F

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AFFIDAVIT

STATE OF MONTANA)
County of Lewis and Clark) : ss

I, VIOLA NELSON, being first duly sworn, depose and say:

That I am a resident of Austin, Montana, and have lived at Austin, Montana, for approximately 23 years; that I have witnessed the use of Placer Survey #1198 by Mr. Don Maynard which is adjacent to my property; that Mr. Maynard has a cabin on his claim and introduced himself to me in the summer of 1981; that the area where the cabin is located is visible from the roadway which leads from Austin to Mullen Pass; that a person working the creek bed by digging would be visible from the roadway if they were situated on the placer claim where Mr. Maynard's cabin is located;

That I recall when Mr. Maynard bought

this mineral claim for taxes in about 1969; about in that year I had a conversation with Mr. Earl Merritt since I was concerned that Mr. Merritt might lose his right to the minerals and I had seen a notice in the paper about the tax sale; that when I called Mr. Merritt and talked to him about this possible problem he said that he knew the taxes were delinquent and intended to do nothing about the delinquency since the taxes were not worth paying off.

That the above statements are true and correct to the best of my knowledge and recollection.

Signed VIOLA NELSON

SUBSCRIBED AND SWORN to before me this 26th day of January 1982.

Signed Richard J. Pyfer

Notary Public for the State of Montana, Residing at Helena, Montana, My Commission expires July 9, 1982.

APPENDIX G

49

IN THE DISTRICT COURT OF THE FIRST
JUDICIAL DISTRICT OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF LEWIS AND CLARK

* * *

SPROUL A. McGUINNESS and all others
similarly situated, ROBERT EARL
MERRITT and CLELLA MERRITT, and
MERRITT RANCH COMPANY,

Plaintiffs/Appellees,

vs.

DONALD E. MAYNARD and LEWIS AND
CLARK COUNTY, MONTANA, a political
subdivision of the State of
Montana,

Defendants/Appellant.

No.46316

NOTICE OF APPEAL

Notice is hereby given that DONALD
E. MAYNARD, appellant above named,
hereby appeals to the Supreme Court
of the United States from the decision

of the Supreme Court of Montana, No. 82-397, filed in this action February 18, 1983 and affirming the judgment of the District Court of the First Judicial District in and for the County of Lewis and Clark, Judge Bennett presiding, Case No. 47316, entered September 14, 1982 and declaring his mineral rights to mineral survey 1198 in the property in litigation to belong to a Sproul A. McGuiness and ordered said defendant to vacate his property.

This appeal is taken as a matter of right and pursuant to 28 U.S.C. § 1257(1),(2), dated this 7th day of March 1983.

Signed Donald E. Maynard

Attorney pro se for Appellant

Box 4063

Helena, Montana 59604

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above on all parties by mail in the U.S. Post Office, postage prepaid on this 7th day of March 1983, such parties being:

Ethel Harrison

Clerk of the Montana Supreme Court

State Capitol Complex

Helena, Montana 59620

Clerk of the United States Supreme Court

Washington, D.C. 20543

John P. Poston

2225 Eleventh Avenue

Helena, Montana 59601

Thomas Honzel

Deputy County Attorney

Lewis and Clark County Courthouse

Helena, Montana 59601

Signed Donald E. Maynard, pro se

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Filed

March 7, 1983

Ethel M. Harrison

Clerk of Supreme Court

State of Montana

APPENDIX H

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MONTANA CODE ANNOTATED

15-18-202. Notice of application for tax deed. (1) The purchaser of property sold for delinquent taxes or his assignee must, at least 60 days previous to the expiration of the time for redemption or at least 60 days before he applies for a deed, serve upon the owner of the property purchased, if known, and upon the person occupying the property, if the said property is occupied, and if the records in the office of the county clerk and recorder show an unreleased mortgage or mortgages upon the property purchased, upon the mortgagee or mortgagees named in said mortgage or mortgages or, if assigned, upon the assignee or assignees of said mortgage or mortgages, a written notice stating that said property or a portion thereof has

been sold for delinquent taxes, giving the date of sale, the amount of property sold, the amount for which it was sold, the amount due, and the time when the right of redemption will expire or when the purchaser will apply for a tax deed. The owner of the property or the mortgagee or the assignee of said mortgagee has the right of redemption indefinitely, until such notice has been given and the deed applied for, upon the payment of fees, percentages, penalties, and costs required by law.

(2) Notice of any owner, mortgagee, or assignee of mortgagee shall be given by registered or certified letter addressed to such mortgagee or assignee at the post office address of said owner, mortgagee or assignee as disclosed by the mortgage records in the office

of the county clerk and recorder. In case of unoccupied property or a mining claim, such notice must be by registered or certified mail deposited in the post office, addressed to any known owner residing in or outside of said county, with the postage thereon prepaid, at least 60 days before the expiration of the time for redemption or at least 60 days before the purchaser applies for such tax deed, in addition to notice to the mortgagee or assignee of mortgagee in the manner and as hereby is provided.

15-18-204. Affidavit of notice.

No deed of the property sold at a delinquent tax sale shall be issued by the county treasurer to the purchaser of the property until the proof of service of notice of application for tax deed has been filed with the county

clerk and recorder as required by 15-18-202. Such purchaser is entitled to receive the sum of \$3 for the service of said notice and the making of said affidavit required by 15-18-202, which sum of \$3 must be paid by the redemptioner at the same time and in the same manner as other cost, percentages, penalties, and fees are paid.

MONTANA CODE ANNOTATED

15-18-205. Form of tax deed - prima facie evidence. (1) The form of a tax deed of an estate in real property, executed by a county treasurer, may be made in substance as follows:

This indenture, made by and between ... (insert name of treasurer), county treasurer of the county of ... (insert name of county), in the state of Montana the party of the first part, and ... (insert name of grantee), the party of the second part, witnesseth:

Whereas, there was assessed for the year ... (insert year) in the name of ... (insert name) that certain tract of land hereinafter described, and the taxes for said year levied against said property amounted to the sum of ... (insert amount) dollars; and

Whereas, said taxes were not paid

and said property was sold for the payment of said taxes to ... (insert name of grantee) on the ... (insert day) of ... (insert month), A.D. ... (insert year) for the sum of ... (insert amount) dollars and certificates of sale were duly issued and filed as required by law; and

Whereas, no redemption from said sale has been made and the said grantee has given the necessary notice of application for tax deed as required by law;

Now, therefore, I, ... (insert name of treasurer), county treasurer of the county of ... (insert name of county), in the state of Montana, for and in consideration of the sum of ... (insert amount) dollars paid do grant to ... (insert name of grantee) all the property situated in ... (insert

name of county) County, State of Montana described as follows: ... (insert description of the land sold for taxes and sought to be conveyed).

Witness my hand this ... (insert day) day of ... (insert month), A.D. ... (insert year).

.....

County Treasurer of County
State of Montana

(2) A tax deed executed in the form as provided in this section, when duly acknowledged and proved, is prima facie evidence that:

(a) the property was assessed as required by law;

(b) the property was equalized as required by law;

(c) the taxes were levied in accordance with law;

(d) the taxes were not paid;

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(e) notice of tax sale was given and published and property sold at the proper time and place as prescribed by law;

(f) the property was not redeemed, and the property notice of application for deed has been served or posted as required by law;

(g) the person who executed the deed was the proper officer;

(h) where the real estate was sold to pay taxes on personal property, the real estate belonged to the person liable to pay the tax.

APPENDIX I

61

CONSTITUTION OF THE UNITED STATES

ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny

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to any person within its jurisdiction
the equal protection of the laws.

APPENDIX J

63

IN THE SUPREME COURT OF THE

STATE OF MONTANA

Cause No. 82-397

SPROUL A. McGUINNESS

and all others similarly situated,

Robert Earl Merritt and Clella

Merritt and Merritt Ranch Company,

Plaintiff/Respondent

-vs-

DONALD E. MAYNARD and LEWIS AND CLARK

COUNTY, Montana, a political

Subdivision of the State of Montana,

Defendant/Appellant.

* * *

APPELLANT'S REPLY TO

RESPONDENT'S BRIEF

* * *

On appeal from the District Court of
the First Judicial District of the State
of Montana, in and for the County of Lewis
and Clark, Judge Gordon R. Bennett, Pre-
siding.

APPEARANCES

For the Plaintiffs: Harrison, Loendorf
and Poston, 2225 11th Avenue, Helena
Montana 59601

For the Defendant, Lewis and Clark
County: Thomas Honzel
Attorney, at Law, 320 East 6th, Helena
Montana 59601

For the Defendant, Donald E. Maynard
Donald E. Maynard
Star Route 1, Box 55
Baldwin, North Dakota 58521

TABLE OF AUTHORITIES

1. Declaration of Independence
2. Supreme Law of the Land
better known as the United States
Constitution
3. Montana Rules of Civil Procedure

Although I realize that my reply is supposed to be confined to new matters raised by Plaintiffs, through their attorney Poston, I believe I am justified in bringing up a very important matter that Poston neglected to comment upon or otherwise refute, and contained in my brief, thereby he has raised the question by his very ominous omission in responding thereto, and that is the question and the fact of the ownership by Earl Lutzenhiser of the remaining mineral rights to the Merritt Ranch Company in the Austin area and adjacent to my one claim only. I attempted to bring this to the Court's attention last September at a hearing in District Court and I was abruptly curtailed by both Judge Bennett and Mr. Poston. My study of the law shows that the

Montana Rules of Civil Procedure require, if not demand that a third party action must be brought against someone so situated as Earl Lutzenhiser is, in Rules 14(a); 19(a); 19(b); and 19(c). It is explicitly required that someone like this be brought into the Action. I repeatedly requested, nay demanded, that my attorneys do this very thing and they refused even after admitting to me that it was required. This omission among many others is why I am proceeding on my own pro se in this matter at the present time.

Now, we will go on to Mr. Poston's Answer to my Brief: On page 4 we find that the Robert Hale Estate owned the mineral rights to the property I have since acquired but he like me, and in the same manner, and that the property lists the Hale Estate

in care of Robert McGinness, Wolf Creek, Montana, who was the apparent possessor of all these mineral rights and had been paying the taxes on them and all the notices of arrears were sent to him.

On page 5, we find Mr. Poston trying to put the blame for taxes not being paid on the shoulders of the County. But, the truth is that the Merritts knew the taxes were not being paid on these mineral rights because they saw them advertised for Sheriff's sale, and were notified personally by Viola Nelson whose affidavit is in both the Official Record of Case No. 46316 and a copy of my Brief to the High Court, exhibit (3). Further, on page 5, we find that "there was at all times an administrator duly appointed by the Court to conduct

and manage the affairs of the Estate". Well, then I ask you, why didn't this "duly appointed" administrator take care of this obvious, to all concerned, failure to pay the taxes? It is not the duty of the County Clerk and Recorder to go and reason gently to these people. No, her duty is to sell the property at Sheriff's sale, after lawful notice, which was given. If the owners have so little regard for their property that they neglect to ascertain if indeed the taxes are being paid, they deserve to lose them, as they did.

I will answer the question posed by myself as to why they had no respect for the property. It is contained in a document entitled the "Decree of settlement of second and final account of administrator and final distribution of Estate", filed for

record the 30th day of March 1960, in the Recorder's office by the County of Lewis and Clark, at Book 213, page 569, and I quote the pertinent part therefrom. "...that there are several pieces of real estate, consisting of scattered mining claims which said administrator has been unable to sell, but that they are of little value..." (emphasis supplied).

I attempted to present this document along with 15 others, of great importance to the case, all duly certified by the Clerk and Recorder of Lewis and Clark County, but Judge Bennett refused to accept them for the Record and file, save one alone that he and Poston felt could do me more harm than good and that is the one quoted from by Poston on page 7 of his brief ... (tr.p.33, L.8 through p.34, L.9; and defendant's

exhibit P)...

I would like to call the Court's attention to the fact that there were also submitted exhibits A,B,C,D,E,F,G,H,I, J, K, L, M, N, and O, which, although of great significance, were refused and now languish yet, in the musty repository of the District Court Clerk's office, which no doubt contains a great number of similarly suppressed exhibits. But, to continue as I must, we come to page 6 of Respondent's Brief which states that "In August 1979, Merritts entered a Contract for Deed to sell their interest in Mineral Survey 1198...." Poston neglects to mention that it also included numerous other mineral rights that are still owned by Earl Lutzenhiser, of Helena, Montana.

On to page 7, we find, according to Poston, ...that the majority of

the mining or other activity conducted on the property by Maynard was after the Complaint and Lis Pendens in this Case were filed... The true facts of the case are that all of the excavations, of which there are many, and the erection of the equipment building and the placement of a large mobile home were completed prior to the Complaint being filed and this is what precipitated, along with other activity, the disasterous legal action filed by Mr. Poston against Maynard. Further, this could all have been verified by documents in my possession and witnesses that are available and would have been so done at something more than a Star Chamber proceeding that resulted in a Summary Judgment against me.

In the third paragraph on page 7, we find that "...the attorney for

Maynard was provided with the names and addresses of several of the heirs of the Hale Estate, including that of Sproul A. McGinness..." This is a complete fabrication in as much as I had to find the present address and phone number of Sproule A. McGinness by and through my own investigation, having been told by my attorney in a letter that I would have to get that information by the process of Discovery. He also had deceitfully informed me previously that Sproule A. McGinness was living in Spokane. This is an example of the duplicity and deception that was inflicted on me and led me, at last, to take over my own defense.

Now, a word about the affidavit mentioned on page 9 of Poston's Brief. There is no evidence supporting Honzel's

claim that there was no affidavit, both the former Treasurer and the County Clerk and Recorder repeatedly informed me that this affidavit had been filed as required by law, and if they had been given the opportunity would, no doubt have testified to this in Court. The affidavit is only required to be filed, not recorded, so perhaps it was misplaced, or lost, or filed in some unknown place. If the Court were to look at how the Clerk handles her papers in that office, they would understand the difficulty in retrieving a document placed in her custody.

I submit to the Court, that this was another fact that should have been tried by a jury with the opportunity to hear all the conflicting claims and counter-claims and made a reasonable

ascertation of fact and fiction.

I will skip further argumentative claims of Poston and go on to the real meat of this case; issue No. 3 on page 17 of Respondent's Brief: The right of trial by jury reserved for all, and to be held inviolate for all.

In the first place, Article II, Section 26, Montana Constitution, 1972, only allows that right to be abrogated when the following is observed: "...But upon default of appearance or by consent of the parties expressed in such manner as the law may provide, all cases may be tried without a jury..." In this case, there was no "default of appearance or consent of the parties expressed". If the Supreme Court has ruled otherwise, it must have been because of extenuating circumstances for the Supreme Law of the Land, the

Constitution, explicitly states in the VII Amendment thereto, and I quote, "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ..." This goes back to the very beginning of our country where it was a complaint levied against the tyrant King of England, where it was enunciated in the Declaration of Independence July 4, 1776, by this Complaint, "For depriving us, in many cases of the benefits of trial by jury". And next the amendment to the Constitution where it is further enlarged upon is Article XIV which declares that no person shall be deprived of property without this due process of law, and further on in Article XVI, all Judges and Judicial Officers are bound to observe the Supreme Law

of the Land, notwithstanding any laws or constitutions of the various states. Therefore, the Law is very clear in demanding that a trial by jury is a prerequisite for justice to be served, and, even more so, in this case where there has been a complete malfunction of the legal process. It may be true that "clever people can never transcend the limitations of the culture they represent" but I see this case as an embodiment of all the tyrannies that our Bill of Rights, Constitution and Declaration of Independence have attempted to thwart and abolish.

In closing, I will state that I am confident that the Court will be able to perceive the justice and rightness in my plea for a reversal of this Summary Judgment from the District Court and will be moved to

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remand this case to the lower Court
in order for me to have some opportunity
to present my side of this controversy
to an impartial jury.

Submitted this 5th day of January,
1983.

Signed: Donald E. Maynard, pro se
Star Rte, 1, Box 75
Baldwin, ND 58521

APPENDIX K

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UNITED STATES CODE

SECTION 2403

Intervention by United States or a State;

Constitutional Question

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as

to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

SECTION 1257

State court; appeal; certiorari

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.